

*30 day Public Comment period
start 8/14/08
effective 9/16/08*

**CERCLA SECTION 122(h)(1) AGREEMENT
FOR RECOVERY OF PAST RESPONSE COSTS**

**SFUND RECORDS CTR
2218000**

| | | |
|--|---|---------------------------|
| IN THE MATTER OF: |) | AGREEMENT FOR RECOVERY |
| |) | OF PAST RESPONSE COSTS |
| Midway Village Site |) | |
| Daly City, San Mateo County, California |) | U.S. EPA Region 9 |
| |) | CERCLA Docket No. 2005-18 |
| The United States Department of Housing and |) | |
| Urban Development; the United States Navy; and |) | |
| Pacific Gas and Electric Company |) | |
| |) | |
| SETTLING PARTY AND SETTLING FEDERAL |) | PROCEEDING UNDER SECTION |
| AGENCIES |) | 122(h)(1) OF CERCLA |
| |) | 42 U.S.C. § 9622(h)(1) |

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to the Superfund Branch Chiefs by Regional Order R9 1290.20.

2. This Agreement is made and entered into by EPA and Pacific Gas and Electric Company ("PG&E") ("Settling Party"), and the United States Department of Housing and Urban Development ("HUD") and the United States Navy ("the Navy"), (collectively "Settling Federal Agencies"). Each Settling Party and Settling Federal Agency consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the Midway Village site, as defined in Section IV, Paragraph 10(1), located in Daly City, San Mateo County, California ("Site"). EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

5. In performing response action, EPA has incurred response costs at or in connection

with the Site.

6. EPA alleges that Settling Party and Settling Federal Agencies are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA, Settling Party, and Settling Federal Agencies recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA and Settling Federal Agencies, and upon Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate

of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA, Settling Party, and Settling Federal Agencies.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA have paid or incurred at or in connection with the Midway Village portion of the response action through December 31, 2006. Past Response Costs only includes costs paid at or incurred in connection with the "Site," as defined herein, and does not include response costs that EPA or the U.S. Department of Justice on behalf of EPA have paid at or in connection with the cleanup at Bayshore Park or Bayshore Child Care Services Daycare Center.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling Federal Agencies" shall mean the United States Department of Housing and Urban Development ("HUD") and the United States Navy ("the Navy").

k. "Settling Party" shall mean Pacific Gas and Electric Company ("PG&E").

l. "Site" shall mean only the Midway Village portion of the Midway Village/Bayshore Park Superfund site located in Daly City, San Mateo County, California, and for purposes of this Agreement, does not include Bayshore Park or Bayshore Child Care Services Daycare Center. Midway Village is a public housing complex that contains 35 multi-unit residential buildings, offices, access streets, and parking lots and is about 17.6 acres in size. It is located in Daly City and bounded by Martin Street to the south, by Schwerin Street to the west, by property owned by PG&E to the north, and by Bayshore Park and the Bayshore Child Care Services Daycare Center to the east. A map generally depicting the "Site" as covered by this Agreement is shown on the map attached hereto as Appendix A.

m. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

10. Within 90 days of the effective date of this Agreement, Settling Party shall pay to

EPA \$12,596.30 in reimbursement of Past Response Costs.

11. Payment by Settling Party shall be made by check made payable to "EPA Hazardous Substance Superfund." Each check, or a letter accompanying each check, shall identify the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number 09ET, and the EPA docket number for this action. Settling Party shall send the check(s) to:

For checks sent by regular U.S. Postal Service mail:

U.S. Environmental Protection Agency
Region 9 Superfund
P.O. Box 371099M
Pittsburgh, PA 15251

For checks sent by express mail:

Mellon Client Service Center
ATTN: Shift Supervisor Lockbox 371099M
500 Ross Street
Pittsburgh, PA 15262-0001

12. At the time of payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site Spill ID Number 09ET and the EPA docket number for this action.

12.1. As soon as reasonably practicable after the effective date of this Agreement, and consistent with Paragraph 12.1(a)(iii), the United States, on behalf of Settling Federal Agencies shall:

(a)(i). Pay to EPA \$113,366.66 in reimbursement of Past Response Costs.

(a)(ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 12.1(a)(i) shall be deposited in the EPA Hazardous Substance Superfund.

(a)(iii). If the payment to EPA required by this Paragraph 12.1(a)(i) is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Agreement, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

12.2 The Parties to this Agreement recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Agreement can only be paid from appropriated funds legally available for such purpose. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

VI. FAILURE TO COMPLY WITH AGREEMENT

13. Interest on Late Payments. If Settling Party fails to make any payment required by Paragraph 10 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 10 are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 13, \$200.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region, and Site Spill ID Number 09ET, and the EPA Docket Number for this action. Settling Party shall send the check and any accompanying letter to:

For checks drawn on U.S. banks sent by regular U.S. Postal Service mail:

U.S. Environmental Protection Agency
Region 9 Superfund
P.O. Box 371099M
Pittsburgh, PA 15251

For checks sent by express mail:

Mellon Client Service Center
ATTN: Shift Supervisor Lockbox 371099M
500 Ross Street
Pittsburgh, PA 15262-0001

c. At the time of each payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the EPA Region and Site Spill ID Number 09ET and the EPA Docket Number for this action.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day payment is past due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

15. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with the requirements of this Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3).

16. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse Settling Party from payment as required by Section V or from performance of any other requirements of this Agreement.

VII. COVENANT BY EPA

17. Covenant Not to Sue Settling Party by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required to be paid by Settling Party by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement. This covenant not to sue extends only to Settling Party, its successors and assigns

and does not extend to any other person.

18. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Section VIII (Reservation of Rights by EPA), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all payments required by Paragraph 12.1 of Section V. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Agreement. This covenant extends only to Settling Federal Agencies and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

19. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party and Settling Federal Agencies with respect to all matters not expressly included within the Covenant by EPA in Paragraph 17 and the Covenant for Settling Federal Agencies by EPA in Paragraph 18. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party and EPA reserves, and this Agreement is without prejudice to, all rights against Settling Federal Agencies, with respect to:

- a. liability for failure of Settling Party or Settling Federal Agencies to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

20. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation, or other entity not a signatory to this Agreement, except for successors and assigns of Settling Party.

IX. COVENANT NOT TO SUE BY SETTLING PARTY

21. Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of California, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

d. Notwithstanding the foregoing, the Settling Party reserves, and this Settlement Agreement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Party's plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

21.1 Settling Federal Agencies covenant not to sue and agree not to assert any claims or causes of action against Settling Party, or its contractors or employees, with respect to EPA's Past Response Costs or this Agreement, including but not limited to, any claim against Settling Party pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to EPA's Past Response Costs.

22. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R.

300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. EPA, Settling Federal Agencies and Settling Party agree that the actions undertaken by Settling Party and Settling Federal Agencies in accordance with this Agreement do not constitute an admission of any liability by Settling Party or any Settling Federal Agency. Settling Party and Settling Federal Agencies do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

27. The Parties agree that Settling Party and Settling Federal Agencies are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

28. Settling Party agrees that, excluding claims related to its insurance coverage, with respect to any suit or claim for contribution brought by it for matters related to Past Response Costs as defined in this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to Past Response Costs, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to Past Response Costs.

29. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

30. Until 10 years after the effective date of this Agreement, Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

31. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (e.g., company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor.

32. Settling Party hereby certifies that, to the best of its knowledge and belief it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site.

33. The United States acknowledges that each Settling Federal Agency: 1) is subject to all applicable Federal record retention laws, regulations, and policies; and 2) has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

34. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA, Settling Party, and Settling Federal Agencies.

As to EPA:

Sara Goldsmith (ORC-3)
Assistant Regional Counsel
U.S. EPA - Region 9
75 Hawthorne Street
San Francisco, CA 94105

David Wood (PMD-6)
Regional Financial Officer
U.S. EPA- Region 9
75 Hawthorne Street
San Francisco, CA 94105

As to Settling Federal Agencies:

Attn: DJ# 90-11-6-17303
Chief
Environmental Defense Section
Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

As to Settling Party:

Barbara Benson
Attorney
Pacific Gas and Electric Company
P.O. Box 7442
San Francisco, CA 94120

Darrell Klingman
Pacific Gas and Electric Company
Mail Code B24A
P.O. Box 770000
San Francisco, CA 94177

XIII. INTEGRATION/APPENDIX

35. This Agreement and its appendix constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendix is attached to and incorporated into this Agreement: Appendix A consists of two maps depicting the Site location.

XIV. PUBLIC COMMENT

36. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XV. EFFECTIVE DATE

37. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 36 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By: 


Kathleen Salyer, Chief
Site Cleanup Branch

8/5/08
[Date]

THE UNDERSIGNED SETTLING PARTY and SETTLING FEDERAL AGENCIES enter into this Agreement in the matter of CERCLA Docket No. 2005-18, relating to the Midway Village Site, as defined herein, which is located in Daly City, San Mateo, California, and includes more particularly, the Midway Village public housing complex that is bounded by Martin Street to the south, by Schwerin Street to the west, by property owned by PG&E to the north and by Bayshore Park and the Bayshore Daycare Center to the east, and is depicted in the map at Appendix A.


FOR SETTLING PARTY: Pacific Gas and Electric Co.
[Name]

P.O. Box 7442, SAN FRANCISCO, CA 94120
[Address]

By: 
[Name]
JUAN M. JAYO

10-22-2007
[Date]

Approved as to Form


Attorney
Barbara Benson

FOR UNITED STATES NAVY:

MARVIN D. NORMAN
[Name]

US NAVY-TREASURY Island
410 AVE of Palms, BLDG 1, STE 161
SAN FRANCISCO, CA 94130
[Address]

By: M. D. Norman
[Name]

3-31-2008
[Date]

FOR UNITED STATES DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT:

William M. Elsbury
Regional Counsel
Region IX
600 Harrison St.
3rd Floor
San Francisco, CA
94107

By: William M. Elsbury June 19, 2008